Supreme Court, U.S.
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No. 93-1885

In The

Supreme Court of the United States

October Term, 1993

SESSIONS TANK LINERS, INC.,

Petitioner,

v.

JOOR MANUFACTURING, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF OF PETITIONER

Petitioner, Sessions Tank Liners, Inc. ("Sessions") respectfully submits this Reply Brief in Support of its Petition for a Writ of Certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Ninth Circuit reported at 17 F.3d 295 (9th Cir. 1994).

I.

THE DECISION BELOW EFFECTIVELY "OVERRULES" THIS COURT'S DECISION IN *ALLIED*

Assuming the Ninth Circuit's conclusion that the damages in this case flowed entirely from the decision of governmental bodies to deny Sessions permits to line underground storage tanks in place, then, of course, this case is factually distinct from *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988). In *Allied*, this Court "decide[d] the case as it was framed by the Court of Appeals." *Id.* at 498 n.2. The Second Circuit "determined that [Indian Head] was awarded damages *only* on the theory 'that the stigma of not obtaining [Code] approval of its products and [Allied's] "marketing" of that stigma caused independent marketplace harm to [Indian Head] in those jurisdictions *permitting* use of [polyvinyl chloride] conduit.' " *Id.* (emphasis in original). The Ninth Circuit, cavalierly sweeping aside the reasoned district court determination that Sessions' damages were also a result of the stigma and its marketing, concluded instead that because the decisionmakers who precluded the use of Sessions' process were governmental officials it was legally impermissible to inquire whether they were

influenced by the stigma or its marketing. The Ninth Circuit concluded that the governmental decisionmaking process could not, as a matter of law, be "deconstructed."

The practical, real world effect of that decision is to emasculate *Allied*. Now, an economically interested decisionmaker can corrupt the process to the maximum extent and produce all the invidious results described by this Court in *Allied* and by Professor Phillip E. Areeda in 7 *Antitrust Law* § 1503 at 373 (1986), with absolute impunity if a governmental body enacts the rigged standard into law, or if, as here, governmental approval is required for product use, or if the government body is itself the purchaser of the product subject. This cannot be the result the Court intended to flow from its decision in *Allied*. If *Allied* is to have continuing vitality, this case, as framed by the Ninth Circuit, requires the Court to consider and decide whether, having violated the antitrust law and lost any *Noerr* protection, a wrongdoer is entitled to an entirely separate *Noerr* analysis in connection with causation/damages. This important question, ***not*** presented by the way the Second Circuit "framed" the issue in *Allied*, is now presented for review.

II.

THERE IS A CONFLICT AMONG THE CIRCUITS

Respondent argues that there can be no conflict among the circuits because the cases cited by petitioner were pre-*Allied*. The cases cited by Sessions[1] each involve,

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[1] *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1296-98 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *Greenwood Utilities Commission v. Mississippi*

as here, deliberate misrepresentations. However, these misrepresentations were made directly to a governmental body. Yet in each case the court permitted the plaintiff to seek damages flowing from the governmental decision. In short, the various courts of appeals "deconstructed" the governmental decision and found it to be the product of deliberate misrepresentations not protected by *Noerr*. But in this case, despite its finding that respondent had engaged in deliberate misrepresentations and other audacious and reprehensible conduct to exclude petitioner's process, the Ninth Circuit finds that governmental decisions regarding approval or purchase of a product cannot be examined and are conclusively presumed to be uninfluenced by such illegal and unprotected conduct. Accordingly, this Ninth Circuit decision cannot be reconciled with the Fifth, Second and District of Columbia Circuits and, indeed, is contrary to an earlier decision of the Ninth Circuit itself.

Power Co., 751 F.2d 1484, 1505 & n.14 (5th Cir. 1985); *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272, 278 (D.C. Cir. 1972); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261-62 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983).

III.

RESPONDENT'S DISTINCTIONS OF PETITIONER'S CASE ALLOWING DECONSTRUCTION OF GOVERNMENTAL DECISIONMAKING ARE MEANINGLESS

Finally, respondent's effort to distinguish *Cantor*[2] and *Walker Process*[3] is hardly genuine. Of course this case does not present a state action issue as in *Cantor*. Nor does it present an alleged fraud on the U.S. Patent Office as in *Walker Process*. But distinguishing the nature of the conduct does not alter the analytic legal process involved in arriving at the decision. In both *Cantor* and *Walker Process* this Court allowed plaintiffs to recover only after examining whether governmental decisionmakers (the Michigan PUC and the U.S. Patent Office) were influenced by private actors. In short, both cases inherently required "deconstruction" of governmental decisionmaking, the exact process the Ninth Circuit holds is impermissible.

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[2] *Cantor v. Detroit Edison Co.*, 428 U. S. 579 (1976).

[3] *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965).

IV.

CONCLUSION

The Ninth Circuit decision in this case not only threatens to eviscerate *Allied* and permit flagrant corruption of the private standard-setting process, it is in conflict with the decisions of other circuits and rests on a premise (the impermissibility of deconstructing governmental decisionmaking), which has already been rejected by this Court. Accordingly, this decision warrants review by this Court and we urge that a Writ of Certiorari issue.

Respectfully submitted,

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